Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHARLES D. BONANNO LINEN SERVICE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
AND
TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Question Presented.

Did the court below err in holding that an employer member of a multi-employer bargaining unit violates the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(5), by unilaterally withdrawing from said unit upon the occurrence of an impasse in collective bargaining negotiations, for the purposes of negotiating individually with the union, and thereafter refusing to execute the multi-employer agreement, where such an opinion is contrary to the decision of five circuit courts of appeals on the same issue?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Charles D. Bonanno Linen Service, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above entitled case.

Opinions Below.

The opinion issued by the court of appeals is reported at — F. 2d — (1st Cir. 1980), and is reproduced in Appendix A of this petition. The Supplemental Decision and Order of the National Labor Relations Board was issued on August 6,

1979, is reported at 243 NLRB No. 140, and is reproduced in Appendix B of this petition. The National Labor Relations Board's initial Decision and Order was issued on June 29, 1977, is reported at 229 NLRB 629 and is reproduced in Appendix C of this petition.

Jurisdiction.

The court of appeals issued its opinion enforcing the order of the National Labor Relations Board on September 12, 1980. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Applicable Statutory Provision.

The statute involved is the National Labor Relations Act, as amended 61 Stat. 136, 713 Stat. 519, 29 U.S.C. § 151 et seq. The relevant sections are 29 U.S.C. 158(a)(1) and (5). The pertinent text is as follows:

§ 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement of the Case.

On October 27, 1976, the parties agreed to stipulate to most of the essential facts which relate to the instant matter. Although the testimony adduced at the hearing before the Administrative Law Judge revealed some disagreement as to details, there is no real disagreement as to the essential facts. The facts as recited herein were, in effect, adopted by the Administrative Law Judge during the course of his decision, (Appendix C) and were not disturbed in the subsequent proceedings.

The New England Linen Supply Association (hereinafter "the Association") was a group of twelve employers engaged in the linen supply and service industry who joined together for the purpose of engaging in collective bargaining with Teamsters Local Union No. 25 (hereinafter "the Union")[1] on a multi-employer basis. Charles D. Bonanno Linen Service, Inc., (hereinafter "Bonanno") had been a member of the Association for several years. Bonanno was a signatory to a collective bargaining agreement covering the period from September 21, 1972 to April 18, 1975.

In accordance with that agreement the Union and Association each gave notice of termination. Bonanno authorized the Association to bargain with the Union in its behalf.

Commencing in April, 1975, the Association and the Union engaged in negotiations for the purpose of executing a new agreement. After several negotiating sessions a proposed contract which provided for compensation of employees on an hourly basis was submitted to the Union membership for ratification. After the employees rejected that contract, the Union at the next meeting proposed that its driver members be compensated on a commission basis rather than on an hourly rate. This position was rejected by the Association in accordance with its prior negotiating position. On May 15 an impasse in bargaining was reached over the issue of the method of compensating drivers.

On June 23, 1975 the Union called a selective strike against Bonanno and the remaining Association members locked out their drivers. Subsequent meetings were held, but the parties were unable to resolve the continuing impasse.[2]

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[1] The Association no longer exists. Bargaining between the Union and former Association members has been on an individual Company basis.

[2] In testimony before the Administrative Law Judge evidence was adduced that the Union met separately with two individual members of the Association. There is no record evidence that separate interim agreements were executed.

On November 21, 1975 Bonanno advised the Association and the Union that it was withdrawing from the Association. Thereupon, the remaining members of the Association terminated the lockout.[3]

After several meetings without Bonanno the Association and Union reached an agreement on a new contract on April 13, 1976. By letter dated April 29, 1976, the Union for the first time informed Bonanno that it considered Bonanno to be bound by the agreement reached with the Association. By letter dated May 3, 1976, Counsel for Bonanno advised the Union that Bonanno was not bound by the agreement referred to in the Union's letter of April 29.

As a result of an unfair labor practice charge filed by the Union, the National Labor Relations Board (hereinafter "the Board") summarily affirmed the decision of an Administrative Law Judge, holding that Bonanno violated Section 8(a)(1) and (5) of the National Labor Relations Act, ("the Act") as amended, 61 Stat. 136, 140, 29 U.S.C. 158(a)(1) and (5), by refusing to execute the collective bargaining agreement reached between the Association and the Union 229 NLRB 629 (1977) (Appendix C. 70).

Thereafter, Bonanno applied for review and the Board applied for enforcement of its Order to the United States Court of Appeals for the First Circuit (Case No. 77-1279). After Bonanno had filed its brief, the Board filed, and the court granted, a motion for leave to withdraw the certified list filed in lieu of record in order to reconsider its decision.

The Board sought enforcement of its Supplemental Decision and Order with the Court of Appeals for the First Circuit. The court of appeals enforced the decision of the Board.[4]

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[3] The strike against Bonanno is still in effect.

[4] On October 6, 1980 the First Circuit entered an order staying its decree until entry of the final decision of this Court upon a petition for writ of certiorari to be filed by Bonanno.

Reasons for Granting the Writ.

The decision by the Court of Appeals for the First Circuit below conflicts with the decisions of five other circuit courts[5] on the question of whether an employer may withdraw from a multi-employer bargaining unit upon the occurrence of an impasse in collective bargaining negotiations.

A decision by this Court is necessary to resolve the extant conflict among the circuits in order that a uniform federal law be established on the issue. A decision by this Court upholding the reasoning of the five circuit courts which have resolved the issue *contra* to the First Circuit will have the salutary effect of balancing the conflicting legitimate interests of employers and unions, by allowing an employer to withdraw from multi-employer bargaining once it becomes clear that bargaining within that framework has become nothing more than an exercise in futility.[6]

Multi-employer bargaining has been recognized as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Labor Board* v. *Truck Drivers Union Local 449*, 353 U.S. 87 at 95 (1957). In the main both employers and unions derive substantial benefits from bargaining in this manner. As the court of appeals stated in its decision herein:

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[5] *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (3d Cir. 1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (8th Cir. 1972); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

[6] According to the United States Department of Labor, in its study of contracts covering 1,000 or more employees, there are 648 multi-employer bargaining agreements, covering more than three million employees. United States Department of Labor, *Characteristics of Major Collective Bargaining Agreements*, 12 (Bulletin 2065, April, 1980) January 1, 1978.

> Multi-employer bargaining offers advantages to both management and labor. It enables smaller employers to bargain "on an equal basis with a large union" and avoid "competitive disadvantages resulting from non-uniform contractual terms" *NLRB* v. *Truck Driver Local 449*, 353 U.S. 87, 96 (1957). At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. . . Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multi-employer bargaining enhances the efficiency of the collective bargaining process and thereby reduces industrial strife. *NLRB* v. *Bonanno*, — F. 2d — (1st Cir. 1980) (Appendix A. 21-22).

However, as demonstrated by this case, the aforementioned desirable results of multi-employer bargaining can not always be achieved. In fact, subsequent to the occurrence of an impasse in negotiations between the Association and the Union, almost eleven months passed before agreement between the parties was reached. During this breakdown in negotiations Bonanno was subjected to a selective strike by the Union and, as a result, most of the remaining members of the Association locked out their drivers. Faced with this stalemate in bargaining Bonanno, after six months of the status quo, concluded that the salutary purposes of multi-employer bargaining had been destroyed by the continuing impasse in negotiations. Therefore, on November 21, 1975, Bonanno advised the Union and Association that it was revoking its prior authorization to the Association to bargain on its behalf and would henceforth bargain directly with the Union.

Bonanno's withdrawal from the Association raises the question as to what circumstances will warrant an employer's withdrawal from multi-employer bargaining once negotia-

tions have commenced. The Board's view of the right of withdrawal which was adopted in *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958) is as follows: Once negotiations between the multi-employer group and union have commenced, an employer's withdrawal from the group is untimely and ineffective unless justified by "unusual circumstances," or by consent granted by the union. The Board has narrowly construed those unusual circumstances which will justify withdrawal during negotiations between a multi-employer group and a union. Such action is sanctioned in but two instances. If an employer can demonstrate that it is faced with dire financial circumstances, circumstances in which the very existence of an employer as a viable business entity has ceased or is about to cease, such as impending bankruptcy, the withdrawal will not violate the Act. See: *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973); *U.S. Lingerie Corporation*, 170 NLRB 750, 751 (1968); *Spun-Jee Corp.*, 171 NLRB 557, 558 (1968). The Board will also find unusual circumstances justifying unilateral withdrawal on a showing that the multi-employer group has been significantly dissipated by reason of consensual withdrawals. The Board reasons that further unilateral withdrawals will not significantly affect public or private interests in effective multi-employer bargaining. See: *Connell Typesetting Company*, 212 NLRB 918, 921 (1974); *Typographic Service Co.*, 238 NLRB No. 211 (1978).

However, the Board has maintained that the occurrence of an impasse in negotiations is not an "unusual circumstance" justifying withdrawal. See, e.g., *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973); *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979) (Appendix B. 41). In so doing they have characterized impasse as only a temporary "deadlock" or "hiatus" in negotiations. In view of the foregoing, the Board held that Bonanno's withdrawal from the Association was ineffective, and its subsequent refusal to execute the

collective bargaining agreement violated § 8(a)(5) of the Act.

Aside from the First Circuit, all of the courts of appeals which have considered the issue have concluded that an impasse in multi-employer bargaining is an unusual circumstance within the meaning of *Retail Associates, supra.* In each case the courts held that an employer's unilateral withdrawal from group bargaining was justified.[7] As the Eighth Circuit held in *Fairmont Foods Company* v. *NLRB,* 471 F. 2d 1170, 1172 (8th Cir. 1972):

> When an impasse in negotiations is reached, withdrawal by a member of a multi-employer bargaining group is excused (citations omitted). This means, of course, that it cannot be bound by a subsequent agreement between a union, having knowledge of the withdrawal, and the other employers.

In *NLRB* v. *Hi-Way Billboards, Inc.,* 500 F. 2d 181 (5th Cir. 1974), the court disagreed with the Board and joined the *Fairmont* Court in concluding that an employer's withdrawal from multi-employer bargaining on the reaching of an impasse was justified. The court viewed the Board's decision as follows:

> "We are impressed with the cogency of the Board's reasoning insofar as the Board's decision would protect the interests of the Union and of the employees in the multi-employer unit. But we have doubts about the fairness of the decision to the employer members of the unit." *Supra* at 183.

The Second, Third and Ninth Circuits have all concluded, in agreement with the Fifth and Eighth Circuits, that the occurrence of an impasse does justify an employer's unilateral

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[7] Such an action does not necessarily extinguish an employer's bargaining obligation. After withdrawal an employer would normally bargain with the union on an individual basis, as Bonanno offered to do in this case.

withdrawal from a multi-employer bargaining group. *NLRB* v. *Independent Association of Steel Fabricators, Inc.*, 582 F. 2d 135, 146 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Company*, 522 F. 2d 475, 483 (3d Cir. 1975); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230, 232 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975).

In the context of multi-employer collective bargaining a union has at its disposal the ability to create severe fragmentation of the multi-employer group. Upon the occurrence of an impasse in bargaining it is permissible for a union to engage in separate negotiations with individual employer members of the group leading to execution of separate interim agreements.[8] In effect, the Board has held that a union may withdraw from multi-employer negotiations with respect to one or more employers and negotiate separate interim agreements with those employers. *Plumbers Union No. 323*, 191 NLRB 592 (1971);[9] *Sangamo Construction Co.*, 188 NLRB 159 (1971). Such agreements engender a *de facto* withdrawal of employer signatories from the multi-employer group.

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[8] Although the Board professes a desire to apply the rules concerning withdrawal equally among union and employers in the multi-employer context, *The Evening News Association, etc.*, 154 NLRB 1494 (1965), *enforced sub. nom., Detroit Newspaper Publishers Association* v. *NLRB*, 372 F. 2d 569 (6th Cir. 1967) such an evenhanded policy breaks down by the sanctioning of a union's right to negotiate separate interim agreements with some members of the multi-employer group. By contrast, it would be an unfair labor practice for an employer to deal directly with an individual union where unions join together for bargaining purposes. *NLRB* v. *General Electric*, 418 F. 2d 736 (2d Cir. 1969).

[9] Unlike the situation in *Plumbers Union No. 323*, 191 NLRB 592 (1971) the Union here struck Bonanno alone, presumably in an effort to "... exert pressure on a single employer or to whipsaw the Association by picking off individual employer members ..." *supra* at 596. After impasse the Union attempted to fragment the Association by engaging in a selective strike against Bonanno, and

The Board has concluded that such agreements prevent significant fragmentation of the multi-employer group, rather than cause such fragmentation, and tend to facilitate the breaking of an impasse. *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 140 (1979), (Appendix B. 51). Such a conclusion by the Board patently ignores the realities of multi-employer bargaining. The execution of such agreements in fact causes considerable fragmentation and weakening of the unity and strength of the multi-employer group. See, e.g., *NLRB* v. *Hi-Way Billboards, Inc., supra* at 183; *NLRB* v. *Beck Engraving Co., supra* at 482-3; *NLRB* v. *Independent Association of Steel Fabricators, supra* at 147; *NLRB* v. *Associated Shower Door, supra* at 232. Those employers who execute interim agreements are producing or operating their businesses while their competitors, the remaining members of the multi-employer group, remain mired in a continuing labor dispute. Moreover, such interim agreements often grant concessions which the other employers are unwilling to grant. In sum, interim agreements fragment the unit, even if such agreements are temporary, allowing some employers to avoid the hardship of a strike and forcing others to lose the benefits of the composite strength for which the multi-employer group was created.

The courts which have considered the issue (with the exception of the First Circuit) have uniformly concluded that in balancing the conflicting legitimate interests of the parties in the multi-employer bargaining context, an employer must be allowed to withdraw from a multi-employer group upon impasse. These courts concluded that such an "impasse doctrine" is necessary in order to offset the power of a union to

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subsequently by holding separate meetings with individual Association members presumably in an effort to negotiate separate agreements. See: *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 483 (3d Cir. 1975); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170, 1174 n.1 (8th Cir. 1972); *NLRB* v. *Callier*, — F. 2d —, — (8th Cir. 1980).

destroy the effectiveness of such a group by negotiating separate interim agreements. The position of these courts was succinctly summarized by the Third Circuit in *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 482-3 (3d Cir. 1975) as follows:

> As we have noted, the Board has enunciated the even-handed principle that its regulations for withdrawal from multi-employer bargaining units are the same for unions and employers. *The Evening News Association, supra,* 154 NLRB at 1501 (1965). Its subsequent decisions have reflected an effort to effectuate this policy. For example, the Board has held in a series of opinions that a union may withdraw from a multi-employer bargaining unit with respect to one or more, but not all, employers if the withdrawal is timely and unequivocal. *Pacific Coast Association,* 163 NLRB No. 129, pp. 892-899 at 896 (1967); *Hearst Consolidated Publications, Inc.,* 156 NLRB No. 16, 210-212 (1965) *enforced sub nom., Publishers Association of New York City* v. *NLRB,* 364 F. 2d 293 (2d Cir.), *cert. denied,* 385 U.S. 971 (1966) . . . *The Evening News Association,* 154 NLRB No. 121, 1494 (1965), *enforced sub nom., Detroit Newspaper Publishers Association* v. *NLRB,* 372 F. 2d 569, 572 (6th Cir. 1967). In substance these cases merely apply the *Retail Associates* rule, *supra,* 120 NLRB 393-395, to the union as well as the employer.
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> But the Board has not contented itself with this approach. Instead, it has given its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit. *P. H. C. Mechanical Contractors,* 191 NLRB No. 121, pp. 592-596 (1971); *Sangamo Construction Company,* 188 NLRB No. 26, 159-163 (1971). *The undeniable import of this policy is that the union may reach agree-*

ments with one or more employers of the bargaining unit and then whipsaw the remaining employers of the bargaining unit. It is not sufficient to say, as the Board does, that such an arrangement does not preclude an individual employer from reaching an individual and interim accord with the union. Rather, the point is that each individual agreement strengthens the union's hand vis a vis those employers who continue to bargain within the unit. Moreover, *allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multi-employer bargaining unit. We believe it inconsistent to say that the union and some employers may act on an individual basis while other employers within the same unit, relegated to this posture by the union's refusal to negotiate with them on an individual basis, must adhere to group bargaining.* The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e. the selective strike and individual negotiations) while the employers are given only one (viz., the lockout). *We believe that the Board's approval of individual, interim agreements during multi-employer bargaining and without requiring withdrawal from the multi-employer bargaining unit is sufficient cause for according the employer an equivalent right.* See: *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 at 1174, n.1 (8th Cir. 1972). *Moreover, the Board's decisions and its stated policy of applying its rules equally to both Union and employer require us also to conclude that a negotiating impasse justifies an employer's unilateral withdrawal from the multi-employer bargaining unit.*

We therefore, join the Ninth, Fifth and Eighth Circuits and hold that a negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining unit.

NLRB v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 at 232 (9th Cir. 1975), *petition for cert.* filed 44 U.S.L.W. 3062 (U.S. July 23, 1975) (No. 75-127); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 at 183-184 (5th Cir. 1975); *Fairmont Foods Co.* v. *NLRB, supra*, at 471 F. 2d 1170 at 1172-1173 and 1174, n.1. (Emphasis supplied.)

Prior to the decision by the First Circuit here, the Second Circuit joined its sister circuits in sanctioning an employer's unilateral withdrawal from a multi-employer group once an impasse in negotiations had been reached. In *NLRB* v. *Independent Association of Steel Fabricators*, 582 F. 2d 135 (2d Cir. 1978) the court concluded that:

> The rule against untimely withdrawal is designed to preserve the stability of multi-employer bargaining which would be impaired if an employer could withdraw whenever it found the results of such bargaining uncongenial or if it felt that it could use the threat of withdrawal as bargaining leverage ... By the same token, however, the objectives of collective bargaining would be ill served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework. Thus, all the circuits which have addressed the issue have concluded that a genuine impasse in negotiations will justify an employer's unilateral withdrawal from multi-employer bargaining. (Citations omitted), *supra* at 146.[10]

Bonanno attempted to reach an agreement with the Union within the framework of the Association. Despite the target-

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[10] In the most recent circuit court pronouncement on the issue, the Ninth Circuit, reaffirmed its conclusion that an impasse in bargaining justifies an employer's unilateral withdrawal from multi-employer bargaining. *H & D, Inc.* v. *NLRB*, — F. 2d —, No. 79-7198, 105 LRRM 3070 (9th Cir. October 8, 1980). The Ninth Circuit stated in *H & D*,

> Recently, this court declared in *Authorized Air Conditioning Co.* v. *NLRB*, 606 F. 2d 899 (9th Cir. 1979), citing cases from

ing of it by the Union for a selective strike, Bonanno endeavored for more than six months after the onset of an impasse between the parties to come to terms with the Union within the context of group bargaining. It was only after Bonanno realized the futility of such efforts that its withdrawal from the Association was effectuated.[11] Having endured the impasse and prolonged selective strike for a substantial period of time, it appeared to Bonanno that the efficiency and effectiveness of bargaining through the Association as contemplated by this Court in *NLRB* v. *Truck Drivers*, 353 U.S. 87, 95 (1957) had been seriously diminished. Moreover, contrary to this Court's hope that multi-employer bargaining would lead to the reduction of industrial strife and "the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining," *supra*, at 95, the selective strike against Bonanno and the impasse continued for six months. In view of the situation, Bonanno effectuated its withdrawal from the Association.[12]

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the Second, Third, Fifth, Eighth and Ninth Circuits that "(t)he Courts of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multi-employer unit." 606 F. 2d at 907. While the Board argues on this appeal that its position, considering the competing policy considerations, is compelling and entitled to judicial acceptance, and that in recent cases the courts' misconceptions of the Board's rulings have been clarified, these contentions are not persuasive and appear to be disposed of in *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230, 232, 88 LRRM 3024 (9th Cir. 1975), and *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475, 90 LRRM 2089 (3rd Cir. 1975). We find no cogent reason at this time to challenge the position taken by this court in *Authorized Air Conditioning Co.* v. *NLRB, supra.*

[11] By letter dated November 21, 1975 to the Association's negotiating committee, a copy of which was sent to Herbert Salter, the Union's Representative, Bonanno gave notice of revocation of its bargaining authorization previously granted to the Association, and its intent to engage in direct negotiations with the Union.

[12] This course of action was in accord with the state of the law as enunciated by the decisions of the courts in *NLRB v. Beck Engraving Co., supra; NLRB* v. *Associated Shower Door, supra; NLRB* v. *Hi-Way Billboards, Inc., supra; Fairmont Foods Co.* v. *NLRB, supra.*

As found by the Administrative Law Judge, before Bonanno withdrew two other employer members of the Association secretly were in contact with the union "presumably in an effort to make a separate settlement." (Appendix C. 57). Notwithstanding those contacts no interim agreements were executed in this case.

It is submitted that an employer's right to withdraw from a multi-employer group should not be made contingent upon the exercise by a union of its admitted right to negotiate separate interim agreements. Rather, in order to insure effectuation of the Board's stated principle that its regulations for withdrawal from multi-employer bargaining units are to be applied equally to unions and employers, *The Evening News Association,* 154 NLRB at 1501 (1965), it is logical to conclude that in response to a union's right to negotiate separate interim agreements upon the occurrence of impasse, an employer should be granted a concomitant right to withdraw from a multi-employer group.

In *NLRB* v. *Beck Engraving Co.,* 522 F. 2d 475 (3d Cir. 1975), the court concluded that an impasse in bargaining justifies withdrawal despite the lack of evidence in that case that the union had attempted to negotiate any separate interim agreements. In so doing the *Beck* court stated:

> The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse). Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage. *Supra* at 483.

The decision of the First Circuit adopts the Board's conclusion that an impasse in bargaining is not an "unusual circumstance" within the meaning of *Retail Associates.* However, while rejecting the decisions of its five sister circuit courts

and its own prior leanings,[13] the First Circuit nonetheless recognized that a union's unrestricted right to negotiate separate interim agreements necessarily weakens the employer's ability to resist the union's economic pressures. "Withdrawal by unit members and their negotiation of separate contracts obviously would reduce the efficiency of the bargaining process." *NLRB* v. *Bonanno*, — F. 2d — (1st Cir. 1980). (Appendix A. 22).

The First Circuit concedes that: "employers have no direct means of countering the union's ability to negotiate individual agreements." (Appendix A. 31). Despite recognition of the adverse impact of separate interim agreements on multi-employer bargaining, the court, in contravention of the unanimity of the other circuit court decisions on the issue has nonetheless chosen to adopt the Board's view. In the main the court's holding is grounded upon its belief that under the circumstances the proper course of action would be to defer to the Board's "specialized judgment." (Appendix A. 36).

While it is true that judicial review is limited, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957), that does "not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases." *Labor Board* v. *Brown*, 380 U.S. 278 (1965).

Courts have a statutory obligation to set aside Board decisions which rest upon an erroneous legal conclusion. 29 U.S.C. § 160(e)(f). As this Court stated in *Brown*, at 292:

> [W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by

[13] See *NLRB* v. *Field and Sons*, 462 F. 2d 748 (1st Cir. 1972); *Jaime Andino d/b/a Jaime Andino Trucking* v. *NLRB*, — F. 2d —, No. 79-1133, Slip op. at 8 (1st Cir. April 25, 1980).

Congress." *American Shipbuilding Co.* v. *Labor Board, post* at 318.

Courts must of course, set aside Board decisions which rest on "an erroneous legal foundation." *Labor Board* v. *Babcock and Wilcox, supra,* at 112-113. Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra* at 498.

All of the circuit courts, with the notable exception of the First Circuit, have accepted this Court's directive and have fulfilled their obligation of judicial review of the Board's decisions on the issue presented by this case. They have concluded that a balancing of "conflicting interests" in multi-employer bargaining mandates that an employer be granted a right to withdraw at impasse.

A decision by this Court is necessary to resolve the conflict among the circuits created by the decision by the First Circuit below. Such a decision upholding an employer's withdrawal will resolve the issue with finality. It will also insure that the Board's professed desire to equalize the regulations governing union and employer withdrawal rights from multi-employer bargaining will be effectuated.

Conclusion.

For the reasons set forth above, this Court should issue a writ of certiorari to review the decision of the court below and after granting such a writ, to reverse the decision of the First Circuit Court of Appeals.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 79-1524

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

and

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

INTERVENOR,

v.

CHARLES D. BONANNO LINEN SERVICE, INC.,

RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

CAMPBELL and BOWNES, *Circuit Judges*, and DAVIS, *Judge.**

John G. Elligers, Attorney with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Standau E. Weinbrecht*, Attorney, were on brief for petitioner.

Sidney A. Coven, with whom *Howard I. Wilgoren*, and *Lepie and Coven* were on brief, for respondent.

James T. Grady, with whom *Gabriel O. Dumont, Jr.*, and *Grady and McDonald* were on brief, for intervenor.

September 12, 1980

* Of the United States Court of Claims, sitting by designation.

BOWNES, *Circuit Judge.*

Pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), the National Labor Relations Board (the Board) petitions for enforcement of a decision[1] which it concedes is contrary to the pronouncements of five circuit courts. At issue is whether the occurrence of an impasse in the course of collective bargaining enables an employer unilaterally to withdraw from a multiemployer bargaining unit and thereafter negotiate with the union on an individual basis. Rejecting the various court decisions indicating otherwise as misguided, the Board concluded that an employer's withdrawal upon occurrence of a bargaining impasse is unjustified and violative of §§ 8(a)(5) and (1) of the Act. In so holding, the Board reaffirmed a position to which it has tenaciously adhered since 1973. For the reasons set forth below, we enforce the Board's order.

I.

The factual findings of the Administrative Law Judge are undisputed. Charles D. Bonanno Linen Service, Inc. (Bonanno) is a Massachusetts corporation engaged in the laundering, rental and distribution of linen products. The truck drivers and helpers employed by Bonanno, as well as by other linen supply companies in the area, have been represented by the Teamsters Local Union No. 25 (the Union). For the purpose of negotiating with the Union concerning the terms of

[1] The Board actually filed two decisions in this case. The first, issued on May 12, 1977 and reported at 229 NLRB 629 (1977), was a summary affirmance of the Administrative Law Judge's opinion and order. The Board subsequently sought leave to reconsider its decision, and for that reason we suspended the respondent's petition for review on October 26, 1977. On August 6, 1979, the Board affirmed its initial opinion in a supplemental decision, reported at 243 NLRB No. 140, 1979-80 CCH NLRB ¶ 16,090 (1979), enforcement of which is now sought.

employment of these workers, Bonanno for several years has joined with nine of its competitors in a multiemployer unit called the New England Linen Supply Association (the Association). Bonanno was a signatory to the most recent contract negotiated between the Association and the Union, which covered the period from September 21, 1972 to April 18, 1975. On February 19, 1975, Bonanno authorized the Association's negotiating committee to represent it in the anticipated negotiations for a new contract, and Bonanno's president became a member of that committee.

The Union and the Association held bargaining sessions throughout March and April of 1975. On April 30, a proposed contract was agreed upon by the negotiators, but was rejected by the Union members four days later. By May 15, the parties had reached an impasse over the issue of compensation: the Union demanded that the employees be paid on a commission basis, while the Association insisted that they continue to receive payment at an hourly rate. When several subsequent meetings proved unsuccessful in breaking the impasse, the Union on June 23 initiated a selective strike against Bonanno. In response, most of the Association members locked out their drivers. The stalemate continued throughout the summer, with the negotiators unable to agree upon a method of payment during their sporadic meetings. During this time, two employers secretly conferred with the Union, "presumably in an effort to make a separate settlement." No such agreement, however, was executed, nor was there any evidence that these contacts even reached the level of negotiations.

On November 21, by which time it had hired permanent replacements for all of its striking drivers, Bonanno notified the Association by letter that it was "withdrawing from the Association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." On

the same day, Bonanno mailed a copy of its revocation letter to the Union and read it over the phone to a Union representative. Shortly thereafter, the Association terminated the lockout and informed the Union that it wished to continue negotiations on a multiemployer basis. Several negotiating sessions were conducted between December and April. On April 13, 1976, the Union abandoned its demand for payment by commission and accepted a management offer of a revised hourly wage rate. With this development, the parties quickly reached agreement on a new contract, dated April 23, 1976, and given retroactive effect to April 18, 1975.

On April 9, 1976, the Union filed the present action, alleging that Bonanno's purported withdrawal from the multiemployer bargaining unit constituted an unfair labor practice. By letter dated April 29, 1976, the Union for the first time informed Bonanno that the Union had never consented to its withdrawal and therefore considered Bonanno to be bound by the settlement just reached. Bonanno denied it was bound by the contract in a reply letter dated May 3, 1976.

II.

Crucial to any examination of the right of withdrawal from a multiemployer bargaining arrangement is an understanding of the private and public interests served by such an arrangement and the extent to which those interests would be undermined were a party free at any time to withdraw from the multiemployer unit. Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain "on an equal basis with a large union" and avoid "the competitive disadvantages resulting from nonuniform contractual terms." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide.

More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions "without fear that other employers will refuse to make similar concessions to achieve a competitive advantage," and a union can act similarly "without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers." *Brief* at 10. Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife. For these reasons, Congress has recognized multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95.

It is apparent that, absent some constraints on the parties' freedom to withdraw from a multiemployer unit during the course of negotiations, the utility of this bargaining process would be substantially undermined. Withdrawal by unit members and their negotiation of separate contracts obviously would reduce the efficiency of the bargaining process. Perhaps more importantly, if the withdrawing members were successful in obtaining more favorable contractual terms, their competitive advantage would encourage additional defections. In order to forestall such withdrawals, the unit's bargaining representative likely would adopt a more extreme position and a more intransigent approach, thereby diminishing the likelihood of a prompt and peaceful settlement. At the same time, a flat prohibition on withdrawal from a multiemployer unit during negotiations would be equally troublesome: such a rule would subvert each employer's interest in controlling its own labor relations, would cause injustice

whenever an employer developed a unique situation requiring individualized treatment, and would undermine the multiemployer bargaining process itself by discouraging involvement therein.

In an effort to balance these competing concerns, the Board in *Retail Associates, Inc.*, 120 NLRB 388 (1958), prescribed guidelines to govern withdrawal from multiemployer bargaining. Under these rules, an employer or union is free to withdraw from the multiemployer unit for any reason prior to the date set for renegotiation of the existing contract or the date on which negotiations actually commence, provided adequate written notice is given. Once negotiations towards a new contract have begun, however, a party may only withdraw if "mutual consent" is given or if "unusual circumstances" exist. *Id.* at 395 (dictum). This approach affords each party an opportunity to rescind its consent to multiemployer bargaining, but restricts unilateral withdrawal during the period when such action would jeopardize the viability and effectiveness of the bargaining process. Even then, however, a necessary measure of flexibility is provided by the "mutual consent" and "unusual circumstances" exceptions. We have recently endorsed the *Retail Associates* approach to multiemployer withdrawal.[2] *See Carvel Co.* v. *NLRB*, 560 F.2d 1030, 1034-35 (1st Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *accord, e.g., McAx Sign Co., Inc.* v. *NLRB*, 576 F.2d 62, 67-68 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *NLRB* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (1966), *cert. denied*, 385 U.S. 1005 (1967).

Since its delineation of the *Retail Associates* guidelines, the Board, with judicial approval, has consistently found "un-

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[2] Although in *NLRB* v. *Field & Sons, Inc.*, 462 F.2d 748, 749-50 (1st Cir. 1972), we expressed some hesitation concerning the inflexibility of the Board's approach, we subsequently disapproved of this dictum in *Carvel Co.* v. *NLRB*, 560 F.2d at 1035.

usual circumstances" to exist in two situations: where extreme financial pressures, such as impending bankruptcy, have threatened an employer's existence,[3] and where the bargaining unit has been substantially fragmented, such as through consensual withdrawals.[4] Whether the "unusual circumstances" exception also encompasses a bargaining impasse — the issue presented here — has invoked a more varied response. For many years, the Board failed to provide a clear-cut answer, first implying that impasse would not justify unilateral withdrawal, *see Ice Cream, Frozen Custard Indus. Employees,* 145 NLRB 865, 870 (1964), only to suggest later that it would. *See Plumbers & Steamfitters Local 323,* 191 NLRB 592, 592 n.1 (1971). In 1973, however, the Board unequivocally ruled that a bargaining impasse was not an "unusual circumstance" within the *Retail Associates* guidelines. *Hi-Way Billboards, Inc.,* 206 NLRB 22 (1973), *enforcement denied,* 500 F.2d 181 (5th Cir. 1974). It reasoned that an impasse did not signify the end of collective bargaining, but rather was a foreseeable stage in the bargaining process — "akin to a hiatus in negotiations" — which per-

[3] *See, e.g., Atlas Electrical Service Co.,* 176 NLRB 827, 830 (1969); *Spun-Jee Corp.,* 171 NLRB 557, 558 (1968); *United States Lingerie Corp.,* 170 NLRB 750, 751 (1968). *Compare, e.g., Universal Insulation Corp.,* 149 NLRB 1397, 1403 (1964), *enforced,* 361 F.2d 406 (6th Cir. 1966) (mere economic hardship resulting from multiemployer agreement not grounds for withdrawal).

[4] *See, e.g., NLRB* v. *Southwestern Colorado Contractors' Ass'n,* 447 F.2d 968, 969-70 (10th Cir. 1971); *Typographic Service Co.,* 238 NLRB No. 211, 1978-79 CCH NLRB ¶ 15,096 (1978); *Connell Typesetting Co.,* 212 NLRB 918, 921 (1974).

Although the Board apparently has never so held, several courts have also found "unusual circumstances" in instances where the negotiating committee does not fairly represent the interests of an employer. *See NLRB* v. *Siebler Heating & Air Conditioning, Inc.,* 563 F.2d 366, 371 (8th Cir. 1977), *cert. denied,* 437 U.S. 911 (1978); *NLRB* v. *Unelko Corp.,* 71 Lab. Cas. ¶13,764 (7th Cir. 1973) (dictum).

mitted the parties to "resort to forms of economic persuasion to establish the primacy of their negotiating position." *Id.* at 23. A rule permitting unilateral withdrawal upon impasse, the Board added, would "herald the demise of multiemployer bargaining," since a member could avoid its bargaining obligations by purposefully creating an impasse whenever "it was dissatisfied with the impending agreement." *Id.* at 23-24. Notwithstanding the Fifth Circuit's refusal to enforce the *Hi-Way Billboards* decision, 500 F.2d 181 (5th Cir. 1974), as well as subsequent expressions of judicial disapproval, the Board has tenaciously adhered to this position ever since[5] and has provided a spirited defense thereof in the instant case. 243 NLRB No. 140, 1979-80 CCH NLRB ¶ 16,090 (1979).

As the Board concedes, there are a number of appellate decisions that conclude, after analysis, that the occurrence of a genuine impasse does justify an employer's unilateral withdrawal from a multiemployer bargaining unit.[6] *See NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 146 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d 475, 483 (3d Cir. 1975); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230, 232 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975) (dictum); *NLRB* v.

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[5] *See, e.g., Seattle Auto Glass*, 246 NLRB No. 21, 1979-80 CCH NLRB ¶ 16,366 (1979); *Golden Bear Motors, Inc.*, 245 NLRB No. 30, 1979-80 CCH NLRB ¶ 16,315 (1979); *Marine Machine Works, Inc.*, 243 NLRB No. 141, 1979-80 CCH NLRB ¶ 16,089 (1979); *Florida Fire Sprinklers, Inc.*, 237 NLRB 1034, 1035 (1978); *Bill Cook Buick, Inc.*, 224 NLRB 1094, 1096 (1976).

[6] In addition, there are several cases — including one of our own — that express the same view in dictum, citing without analysis to one or more of the cases listed in the text. *See Jaime Andino d/b/a Jaime Andino Trucking* v. *NLRB*, No. 79-1133, slip op. at 8 (1st Cir. April 25, 1980); *Authorized Air Conditioning Co., Inc.* v. *NLRB*, 606 F.2d 899, 907 (9th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3626 (April 1, 1980); *NLRB* v. *Acme Wire Works, Inc.*, 582 F.2d 153, 156-57 (2d Cir. 1978).

Hi-Way Billboards, Inc., 500 F.2d 181, 183-84 (5th Cir. 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170, 1172 (8th Cir. 1972) (alternative holding). In fact, in its supplemental decision below, the Board endeavored at some length to rebut this line of cases as misguided and unpersuasive. Upon close analysis, however, all but one of these cases prove inapposite to, or otherwise distinguishable from, the situation at hand.

III.

Fairmont Foods Co. v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972) — the first case to rule that an impasse justifies withdrawal — was decided prior to the Board's *Hi-Way Billboards* decision, at a time when its pronouncements on this issue were ambiguous and even contradictory. The court reached this conclusion, in the course of rejecting the Board's factual determination that no impasse existed, by relying on *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enforced in part*, 190 F.2d 576 (7th Cir. 1951) — a decision which the Board below characterized as "no longer valid."[7] More importantly, the Board in *Fairmont Foods* had adopted the trial examiner's rulings which themselves suggested that an impasse would justify withdrawal. 196 NLRB 849, 856 (1972). In reaching the same result, therefore, the Eighth Circuit

[7] Reasoning that the withdrawal rights of unions and employers should be at least similar if not coextensive, the Board in *Morand* accorded to unions the right to withdraw upon impasse after noting that, under its prior decisions, employers had "unlimited freedom" to withdraw "at any time . . . at their will or fancy." 91 NLRB at 418. The Board subsequently abandoned this hands-off approach in *Retail Associates*.

The *Fairmont Foods* court also relied, erroneously, on *Ice Cream, Frozen Custard Indus. Employees*, 145 NLRB 865 (1964). The Board's decision there, although ambiguous, suggested that an employer could withdraw upon impasse only if the union consented, *id.* at 870 — a position first enunciated in *Retail Associates*.

was merely articulating its perception of Board policy in effect at the time — a policy which the Board subsequently revamped in *Hi-Way Billboards.*

Three of the four remaining cases involved very similar factual settings. In *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974), a negotiating impasse had been reached, a strike had been called, and the union had signed "interim" agreements with several members of the multiemployer unit. These agreements permitted the several employers to resume operations but required them to adhere to any unit-wide contract ultimately negotiated. The same circumstances existed in *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975), and *NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979), except that the individual agreements negotiated by the several employers were not interim in nature, but were final contracts designed to remain in effect regardless of the outcome of the group bargaining. In each case, a second group of multiemployer members asserted a right to withdraw unilaterally from the unit in response to such agreements; in each case, the court rejected the Board's ruling and held that the employers were entitled to withdraw and thus were not bound by the subsequently negotiated multiemployer agreement.[8]

Employing a similar analysis, the courts concluded in essence that a contrary result would be unfair to the employers comprising the bargaining unit.[9] Crucial to this as-

[8] In *Associated Shower Door,* however, the Ninth Circuit enforced the decision on alternative grounds, agreeing with the Board's conclusion that the withdrawing members' subsequent conduct constituted a "retraction" of their withdrawals. 512 F.2d at 232-33.

[9] *See NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d at 232 ("it seems only fair" that withdrawal should be allowed under the

sessment was the Board policy that, once negotiations have begun, "a union may withdraw from a multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit." *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d at 183.[10] One concern was that this policy appeared to undercut the principle espoused in *Evening News Assoc.*, 154 NLRB 1494 (1965), *enforced sub. nom., Detroit Newspaper Publishers Assoc.* v. *NLRB*, 372 F.2d 569 (6th Cir. 1967), that all rules governing the right of withdrawal in the multiemployer context would be applied equally among employers and unions. But the greater concern was the impact of this policy on the remaining members of the multiemployer group, "who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike." *NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d at 147. The anticipated result of this arrangement, which all three courts deemed unacceptable, was that "a union could reach an agreement with one or more employers and then whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit." *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F.2d at 232, *quoted in NLRB* v. *Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d at 147 n.21; *accord,*

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circumstances); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d at 183 ("we have doubts about the fairness of the decision to the employer members of the unit").

[10] The *Hi-Way Billboards* and *Associated Shower Door* courts erroneously relied on *Pacific Coast Ass'n of Pulp & Paper Manufs.*, 163 NLRB 892 (1967), to support this proposition. There, the Board merely upheld the right of unions to withdraw prior to the start of negotiations — a straightforward application of the *Retail Associates* guidelines. The quoted statement is nonetheless an accurate description of Board policy, with one qualification which we discuss below. *See* nn. 16 & 17 *infra.*

NLRB v. *Hi-Way Billboards, Inc.*, 500 F.2d at 183. At bottom, then, was a dissatisfaction with a perceived imbalance in relative bargaining strength.[11] In *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975), a case we discuss *infra*, the Third Circuit articulated this concern most emphatically: "The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e. the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)." *Id.* at 483. Although acknowledging that its decision would "contribute ... to instability within the context of multi-employer bargaining," *id.*, the *Beck* court deemed it necessary, as did the other courts, to correct this imbalance by supplying the employers with a second weapon: the ability to withdraw from a multiemployer group upon impasse.[12]

For several reasons, we feel the approach adopted by these four courts is questionable. First, the Supreme Court has indicated that the legitimacy of any particular bargaining tactic

[11] As an alternative basis for its conclusion that impasse justifies withdrawal, the *Steel Fabricators* court indicated that "the objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework." 582 F.2d at 146. This result-oriented approach sacrifices the long-term value of stable multiemployer bargaining to the immediate goal of expediting the collective bargaining process. *See* Note, 45 Brooklyn L. Rev. 1283, 1305, 1317-18 (1979). It also, contrary to the Board's opinion, regards impasse as an unexpected and aberrant occurrence which signifies an irretrievable collapse in negotiations, rather than as a predictable, often temporary, and occasionally purposefully created stage in the bargaining process. Given the public and private interests served by multiemployer bargaining and the Board's expertise, we consider the Second Circuit's rationale an insufficient justification by itself to override the Board's considered judgment.

[12] The court in *Beck* suggested that the Board might prefer to effect an alternative equilibrium by forbidding unions from negotiating individual agreements. 522 F.2d at 484 n.15.

or weapon should be based solely on the pertinent statutory provisions, and not on any assessment of relative bargaining strength.[13] As a result, the balance of economic power arguably should have little bearing on the question whether impasse justifies withdrawal.[14] Second, even if a cataloguing of economic weapons were appropriate, the final tallies reached here are incomplete. The *Beck* court's two-to-one tabulation ignores, on the one hand, a union's ability to institute consumer picketing and to engage in "harassing tactics," *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 480-81 (1960), and on the other an employer's ability, *inter alia*, to "legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another . . . ." *NLRB* v. *Brown*, 380 U.S. 278, 283 (1965).[15] The balancing undertaken is thus somewhat imprecise.

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[13] *See American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 317 (1965) (the Act does not "give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB* v. *Brown*, 380 U.S. 278 (1965); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490, 497 (1960). This restriction, designed to effectuate the congressional intent that the Board not control the substantive terms of any collective bargaining agreement, *id.* at 485-87, apparently encompasses judicial actions as well: the Court in *Insurance Agents* indicated that the "substantive solution" of the parties' differences should be "unrestricted by any governmental power." *Id.* at 488.

[14] *See* Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 60 (1977); Comment, 17 B.C. Indus. & Com. L. Rev. 525, 536-37 (1976).

[15] The sole employer weapon mentioned by the courts — the lockout — is itself a multi-faceted device. Not only can the nonstruck members of a multiemployer unit lock out their employees as a defense to a whipsaw strike against other unit members, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957), but the struck members can hire permanent replacements, *NLRB*

Of course, the additional weapons in the employer arsenal are useful primarily in resisting a strike, and the fact remains that employers have no direct means of countering the union's ability to negotiate individual agreements. But upon analysis, we question whether this right of the union — at least as currently defined by the Board — constitutes as formidable a weapon, and creates as marked a disparity in bargaining power, as the courts suggest. Contrary to the implication in *Associated Shower Door*, 512 F.2d at 232, and *Hi-Way Billboards*, 500 F.2d at 183, the Board has not granted the unions unlimited withdrawal rights. Rather, the economic weapon at stake consists solely of the union's ability to negotiate "interim" agreements[16] — temporary settlements

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v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938), and the nonstruck members can hire temporary replacements, *NLRB* v. *Brown*, 380 U.S. 278 (1965), thereby resuming normal operations. Moreover, even in the absence of a strike, all employers can use the lockout offensively to exert economic pressure on a union. *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1964).

[16] To be distinguished are "separate" agreements, defined as final contracts entirely divorced from the multiemployer process. The Board has disapproved of a union's negotiation of separate contracts with group members, considering such conduct antithetical to and destructive of the multiemployer bargaining process. As a result, in most cases where one or more group members have reached separate agreements with the union, the Board has permitted the remaining members to withdraw. *See, e.g., Typographic Service Co.*, 238 NLRB No. 211, 1978-79 CCH NLRB ¶ 15,096, at 28,319 (1978); *Connell Typesetting Co.*, 212 NLRB 918, 921 (1974). The exception consists of situations where the union's conduct neither "proves an intention to destroy, [n]or necessarily causes the fragmentation of, a multiemployer unit." *Tobey Fine Papers*, 245 NLRB No. 181, 1979-80 CCH NLRB ¶ 16,330, at 30,539 (1979). Significantly, the Board has recently held that an employer's ability to negotiate a separate agreement is dependent on the consent of the multiemployer group. *Teamsters Local 378*, 243 NLRB No. 138, 1979-80 CCH NLRB ¶ 16,087 (1979). The employers can thus effectively prevent any of their members from defecting in the first place — an alternative that ensures the continued viability of the multiemployer group.

that will be superseded by any unit-wide contract ultimately negotiated.[17] There is little doubt that, through the selective use of this device in combination with a general strike, a union is capable of exerting some degree of uneven economic pressure — a whipsaw effect — on certain employers. But there is much to be said for the Board's position. As demonstrated by the lawfulness of such weapons as the selective

[17] In the Board's view, interim agreements neither fragment nor significantly weaken the multiemployer unit, and indeed do not represent withdrawals at all, since the signatories retain a vested interest in the outcome of group negotiations. Of course, even the Board has acknowledged that a party to such an agreement, having alleviated its immediate concerns and quite possibly enjoying a competitive surge relative to its struck counterparts, is less likely to push for a prompt settlement or otherwise share the group's bargaining strategies, *see Connell Typesetting Co.*, 212 NLRB at 921; in that sense, its strength at the negotiating table will have diminished. But by promising adherence to the ultimate unit-wide contract, a signatory cannot ignore entirely the ongoing negotiations. For this reason, we cannot subscribe to the Third Circuit's view that "allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multiemployer bargaining unit." *NLRB* v. *Beck Engraving Co., Inc.*, 522 F.2d at 483. Although interim agreements may not enhance the integrity of the bargaining unit, they seem unlikely to undermine it significantly.

Interim agreements are considered useful in facilitating the breaking of a stalemate and in providing a safety valve for employers particularly vulnerable to strike pressure. The Board has thus sanctioned the use of these arguments and has barred other employers from unilaterally withdrawing from the bargaining unit in response thereto. *See, e.g., Joseph J. Callier d/b/a Callier's Custom Kitchens*, 243 NLRB No. 143, 1979-80 CCH NLRB ¶ 16,104, at 30,135 (1979); *Sangamo Constr. Co.*, 188 NLRB 159, 160 (1971). The Board has also suggested, however, that an "unusual circumstance" permitting withdrawal might arise even here if interim agreements are negotiated on such a scale or on such terms as to evidence an intention on the union's part to fragment the bargaining unit. *See, e.g., Connell Typesetting Co.*, 212 NLRB at 921; Comment, 44 Fordham L. Rev. 1256, 1265 (1976).

strike, the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining. In addition, the whipsaw effect resulting from a general strike coupled with one or more interim agreements corresponds closely to that arising from a selective strike followed by a partial employer lockout.[18] Because courts have seen no reason to fashion an additional weapon for employers in the latter instance, we question the necessity of doing so in the former.

But regardless of the propriety of the analytical approach adopted in *Hi-Way Billboards, Shower Door,* and *Steel Fabricators,* it is apparent that the three decisions hinged on the belief that the negotiation of individual agreements had unfairly tipped the balance of bargaining power, and not on any conviction that impasse alone justifies unilateral withdrawal.[19] This critical element is absent in the present case; as the Board stated, "no interim agreements were made or even attempted." Accordingly, these three decisions do not control our analysis.

By contrast, the *Beck* case is squarely on point. One member of a multiemployer unit there attempted to withdraw following the occurrence of an impasse and a selective strike. Notwithstanding that the union had made no attempt to negotiate individual agreements,[20] the court upheld the employer's withdrawal. It reasoned:

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[18] Those employers who sign interim agreements and resume operations are in an analogous position to those who refuse to join a lockout and thereby remain in operation. And significantly, just as the latter group could prevent any whipsaw by engaging in the lockout, the former group could do so by refusing to negotiate such agreements.

[19] *See* Murphy, *Impasse and the Duty to Bargain in Good Faith,* 39 U. Pitt. L. Rev. 1, 57 (1977); Comment, 44 Fordham L. Rev. 1256, 1264, 1266 (1976).

[20] One member had withdrawn earlier, but with the consent of both the group and the union. 522 F.2d at 478.

> The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse). Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage.

522 F.2d at 483. For several reasons, we find this rationale unpersuasive.

First, contrary to the court's premise, the Board has not in the past conditioned the ability of a union to negotiate interim agreements upon the existence of a bargaining impasse. The Board sanctioned the use of such agreements in *Sangamo Constr. Co.*, 188 NLRB 159 (1971), for example, notwithstanding the absence of any finding that an impasse had occurred. *Id.* at 160 ("bargaining did continue during the operative period").[21] Even if some right of withdrawal is necessary to counterbalance the union's ability to negotiate interim agreements, therefore, there is little reason to link it to the existence of an impasse.[22] Second, the court's charac-

[21] We express neither approval nor disapproval of the result reached in *Sangamo Constr. Co.*, 188 NLRB 159 (1971), as the matter is not now before us.

[22] Instead, the exercise of that right logically should be contingent upon the actual creation of such agreements. The *Beck* court's concern that, if the union's right "accrues first" it will gain "a tremendous bargaining power and leverage" over the employer group, seems misplaced. As noted above, interim agreements do not significantly impair the integrity of the bargaining unit. Moreover, unlike such weapons as a selective strike which can be deployed unilaterally, the union needs at least one consenting party to implement these agreements. Therefore, the union's ability to *threaten* to negotiate interim agreements should augment its bargaining power only minimally, if at all, especially if employers are able to withdraw upon any agreement actually being reached. And the Board could justifiably reject any measure that attempts to counteract such incremental leverage by sacrificing the stability of the multiemployer unit.

terization of an impasse as an event that neither party can "manipulate" appears unrealistic, or at least the Board could permissibly so conclude. It is true that a party's general adoption of a "take it or leave it" attitude would violate the statutory obligation to bargain in good faith. *See generally NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. at 483-87. But the Act expressly provides that the "obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). We thus think it within the power of an employer or union in many cases to cause a stalemate, as by adhering to a position known to be unacceptable to the other side. To the extent this is possible, the *Beck* rule provides a party with a means of withdrawing whenever the impending agreement proves objectionable.[23] Third, because a precise formula for determining when a genuine impasse occurs has not been — and perhaps cannot be — formulated,[24] tying the right of withdrawal to this event can only lead to confusion concerning the rights of the parties. Finally, we feel that the *Beck* decision, and indeed the other cases as well, fail to accord suf-

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[23] *See* Note, 45 Brooklyn L. Rev. 1283, 1318 (1979); Comment, 17 B.C. Indus. & Com. L. Rev. 525, 539-40 & n.133 (1976).

[24] One widely accepted definition of impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB* v. *Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). The Board has fleshed out the term somewhat, indicating that whether an impasse has occurred depends on such factors as "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968). Nonetheless, the decisional process remains at best an exercise of "judgment," *id.*, and a worst "a visceral reaction of the trial examiner and the Board to the record." Stewart & Engeman, *Impasse, Collective Bargaining and Action*, 39 U. Cin. L. Rev. 233, 241 (1970).

ficient weight to the policy of preserving the stability of multiemployer bargaining — a "vital factor" in promoting labor peace. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 95. The Board could find that any rule permitting unilateral withdrawal upon impasse unnecessarily increases the opportunities for the dissolution of such bargaining units and thereby undermines an effective tool of labor relations.

Congress "intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining [which are] bound to arise . . . ." *Id.* at 96. As a result, the Board's "balancing of the conflicting legitimate interests [is] subject to limited judicial review." *Id.* (footnote omitted).[25] In the present case, we think the Board has struck a reasonable balance in concluding that impasse alone does not justify unilateral withdrawal.

IV.

Bonanno's remaining contention — that the Union consented to or otherwise acquiesced in its withdrawal — can be dismissed more summarily. In support thereof, Bonanno notes that the Union (1) did not explicitly object to its announced withdrawal on November 21, 1975, (2) continued to negotiate with the Association representatives, at one point inquiring as to who had replaced Bonanno on the committee, and (3) did not formally protest the attempted withdrawal until April 29, 1976, more than two weeks after a unit-wide agreement had been reached. These facts provide an insufficient basis to disturb the trial examiner's findings. A union is "under no duty to 'protest' [an employer's attempted withdrawal] in any formal manner . . . ." *NLRB* v. *John J.*

[25] A reviewing court's principal task is to ensure that the administrative decision is not "inconsistent with a statutory mandate [and does not] frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. at 291.

Corbett Press, Inc., 401 F.2d 673, 675 (2d Cir. 1968). Here, the Union representative responded that he would have to consult with the Union attorney — certainly an indication more of opposition than of acquiescence. And although the Union's course of conduct can evidence implied consent, such conduct "usually must involve a course of affirmative action clearly antithetical to" the claim that no withdrawal has occurred. *I.C. Refrigeration Service*, 200 NLRB 687, 689 (1972). In the present case, that the Union made no attempt to negotiate individually with Bonanno, *see id.*, that a unit-wide agreement was not reached shortly after Bonanno's action, *compare, e.g., Fairmont Foods Co.* v. *NLRB*, 471 F.2d at 1173, and that the Union filed unfair labor practice charges on April 9, 1976 with respect thereto, all serve to negate any suggestion of Union acquiescence in Bonanno's untimely and — we rule — unlawful attempt to withdraw from the Association.

Enforcement granted.

CAMPBELL, *Circuit Judge* (Concurring). While I join in the ultimate conclusion of the court, namely, that "the Board has struck a reasonable balance in concluding that *impasse alone* does not justify unilateral withdrawal" (emphasis added), I emphasize that we are not here presented with the question whether, after the occurrence of both an impasse and the negotiation of interim agreements, an employer may unilaterally withdraw from a multi-employer group; accordingly, I would express no opinion on the resolution of the latter question, and do not join in the court's dicta on this interesting but nonessential matter.

Appendix B.

FJPMT

243 NLRB No. 140

D—4660
Medford, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARLES D. BONANNO LINEN SERVICE, INC.

and

Case 1—CA—11628

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER

On May 12, 1977, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement reached between Teamsters Local No. 25 (the Union) and the New England Linen Supply Association (the Group).[2] In so finding, the Board adopted the Administrative Law Judge's Decision in which he found that the

[1] 229 NLRB 629 (1977).

[2] The Respondent is in the business of laundering and renting uniforms and linens. It has been a member of the Group which has negotiated with the Union for several years. Before the last contract expired in April 1975, negotiations were duly opened for a

Respondent's untimely withdrawal from the multiemployer Group was not justified. The Administrative Law Judge relied on *Hi-Way Billboards, Inc.*,[3] in holding that the existence of a bargaining impasse is not an "unusual circumstance" within the meaning of *Retail Associates, Inc.*[4] He specifically noted that four courts of appeal had rejected the Board's position that a bargaining impasse does not constitute such an unusual circumstance as to justify an employer's unilateral withdrawal from group bargaining. The Administrative Law Judge concluded, however, that he was bound by the *Hi-Way Billboards* rule of the Board.

In light of the holdings of the several courts of appeal[5] which have formulated an "impasse doctrine" enabling an

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new agreement and the Respondent authorized the Group to bargain in its behalf. The Respondent participated in the negotiations. Impasse was reached in May 1975 over whether the employees would be paid on a commission basis or remain on wages. Thereafter, in June 1975, the Union called a selective strike against the Respondent, and most of the Group responded by locking out their employees. After some 5 months during which the situation remained static, with all efforts to break the impasse failing, the Respondent withdrew from the Group. The remaining Group members then terminated the lockout and negotiations resumed with the Respondent absent. In April 1976, when the Union dropped its demand for compensation by commission, an agreement was reached. The Union thereafter informed the Respondent that it had not consented to the withdrawal and thus considered the Respondent bound by the terms of the agreement reached with the Group. The Respondent denied that it was bound and refused to execute the agreement.

[3] 206 NRLB 22 (1973).

[4] 120 NLRB 388 (1958).

[5] *N.L.R.B.* v. *Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *N.L.R.B.* v. *Associated Shower Door Co., Inc., et al.*, 512 F.2d 230 (9th Cir. 1975); *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); and *Fairmont Foods Company* v. *N.L.R.B.*, 471 F.2d 1170 (8th Cir. 1972). Since the May 1977 Decision and Order in the instant case *the second circuit has joined its*

employer to withdraw unilaterally from a multiemployer bargaining unit, the Board, *sua sponte*, has decided to reconsider the instant case. For reasons to be set forth below we have concluded that this case was correctly decided and *we hereby affirm our conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the contract reached between the Union and the Group which represented the Respondent.*

I

The basic rules governing withdrawal from multiemployer bargaining associations were set forth in *Retail Associates.* Absent mutual consent[6] or unusual circumstances, neither an employer nor a union may withdraw except upon unequivocal written notice prior to the date set by the contract for modification or the agreed-upon date to begin multiemployer negotiations. The Board has since held that these rules are to be applied equally to both employers and unions.[7] With respect to partial withdrawal, a union may, upon timely notice, consent to an individual employer's withdrawal and continue multiemployer bargaining unless the remaining employers exercise, in a timely fashion, their right to withdraw from the fragmented unit.[8]

"sister Circuits" in holding that an impasse will justify a party's unilateral withdrawal from multiemployer units. N.L.R.B. v. *Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978).

[6] While the Group's position on the Respondent's withdrawal is not at issue in this proceeding, an employer who wishes to perfect an untimely withdrawal must secure the consent of both the union and the multiemployer association of which it has been a member. See *Teamsters Union Local No. 378 (Olympia Automobile Dealers Association)*, 243 NLRB No. 138 (1979). Member Murphy was not a signatory to the *Olympia Automobile Dealers Association* decision and, in any event, does not find it applicable or relevant to the issue now before the Board.

[7] *The Evening News Association, etc.*, 154 NLRB 1494 (1965).

[8] *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 NLRB 892 (1967).

For withdrawals after negotiations have begun, the Board has limited the "unusual circumstance" exception to cases in which "the very existence of an employer as a viable business entity has ceased or is about to cease"[9] *and to cases where consensual employer withdrawals through separate bargaining have so depleted a unit that it would be "unfair and harmful to the collective-bargaining process" not to permit one or more of the remaining employers to withdraw.*[10]

As to whether a bargaining impasse alone is sufficient to warrant withdrawal, our position, which we now reaffirm, is set forth in *Hi-Way Billboards, supra.* We there *held that there is nothing so extreme about impasse as to make it an unusual circumstance which is destructive of group bargaining. An impasse is only a temporary "deadlock" or "hiatus" in negotiations which in almost all cases is eventually broken, either through a change of mind or the application of economic force.* Indeed, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those wage increases or benefits it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation. And much the same

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[9] *Hi-Way Billboards, Inc., supra* at 23.

[10] *Connell Typesetting Company, et al.,* 212 NLRB 918, 921 (1974).

may be true even of impasses which arrive without being intended by either side. Consequently, there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways. For these reasons, we *held that it would not effectuate the policies of the Act to permit an employer to withdraw from a multiemployer unit solely because a bargaining impasse has been reached.*

The courts of appeal that have rejected this position have not, in our view, focused exclusively on the impact of impasse on the collective-bargaining process. We suggest that the courts have seized on the impasse concept as a means of addressing two other important problems that can arise in the multiemployer context; namely, unit fragmentation and imbalances in relative bargaining strength.[11] After reviewing the court decisions in question, we shall synthesize our views on union and employer obligations at impasse. We shall treat, in particular, the impact of interim agreements following impasse on multiemployer bargaining dynamics.

II

In *Fairmont Foods Company, supra,* the court excused an employer's withdrawal from a multiemployer bargaining unit after negotiations had begun but before an agreement had been reached.[12] Additionally, the court found evidence of union consent to Fairmont's withdrawal in the fact that the union was willing to negotiate during impasse with other association members. It was "particularly incongruous," the

[11] For a scholarly recognition and discussion of this point, see Murphy, "Impasse and the Duty To Bargain in Good Faith," 39 U. of Pittsburgh L. Rev. 1, at pp. 50-60 (1977).

[12] The court relied on *Morand Brothers Beverage Co., et al.,* 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). The Board's holding in this case predated *Retail Associates, supra,* and is no longer valid.

court suggested, that the Board had not found acquiescence in the withdrawal in light of interim agreements, intended to be merged later into the associationwide agreement, between the union and three other employers.

The Fifth Circuit, in *Hi-Way Billboards, Inc., supra,* accepted the Board's reasoning on the impact of impasse only insofar as our decision protected the interests of the union and of the employees in the multiemployer unit. The court expressed doubts, however, as to the "fairness" of the Board's policy of not permitting unilateral employer withdrawal at impasse. The court relied on *Pacific Coast Associates, supra,* in finding Board support for a union's withdrawing with respect to some employers while it continues a multiemployer relationship with a now depleted association.[13] The Fifth Circuit disapproved, on equitable grounds, of the Board-sanctioned opportunity, taken in *Hi-Way Billboards, Inc.,* for a union to reach interim agreements with some employers and then to whipsaw those employers remaining in the association.

The third court to consider withdrawal rights at impasse was the Ninth Circuit in *Associated Shower Door Co., Inc., supra.*[14] The court, following the Fifth and Eighth Circuits, relied on *Pacific Coast* and *The Evening News Association,*

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[13] With all due respect, we note that the court misread *Pacific Coast.* As indicated, *supra,* we allowed union withdrawal in that case because timely notice was given prior to the start of negotiations. *Pacific Coast* would not in any case lead to whipsawing, since we also held that individual employers are also free to withdraw prior to negotiations.

[14] After impasse, the union signed interim agreements with several members of the association after those members had sought out the union, requesting separate settlements based on the union's last offer. The union agreed and included "most favored nation" clauses in the separate agreements. When the association finally settled with the union it got less favorable terms than the employer-members who had signed the separate agreements.

supra, as to equality of withdrawal rights, and reasoned that (at 512 F.2d at 232):

> [I]t seems only fair that, when an impasse is reached and a union then engages in selective picketing and enters into substantial individual agreements with employers who had been members of the multiemployer unit, the withdrawal of the remaining members of the unit, if unequivocally communicated, should be permitted.

Otherwise, the court stated the union could sign individual agreements with some employers and then subject the remaining members of the "significantly fragmented and weakened multiemployer unit" to whipsawing. The court thus designed a fairness rationale which viewed the Board as having violated its own policy of preserving the equality of withdrawal rights in multiemployer situations.

In *Beck Engraving Co., supra,* the Third Circuit found that an impasse reached in multiemployer bargaining constituted an unusual circumstance under *Retail Associates* and thus justified the respondent's unilateral withdrawal.[15] The court's analysis did not directly confront the Board's *Hi-Way Billboards* rationale. The Third Circuit agreed with the *Shower Door* decision that the Board has, in its post-*Retail Associates* decisions, deviated from its policy of applying its rules in an even-handed manner. Since the Board has approved a union's negotiation of interim agreements with in-

[15] When a bargaining impasse was reached during negotiations for a new contract, the union began a selective strike. Then the union, the association, and an individual employer agreed to that employer's withdrawal from the unit. Thereafter, more employers were struck. The respondent's employees withdrew from the union and returned to work and the respondent then announced its withdrawal from the association. Shortly thereafter the union and the association reached agreement on a new contract which the respondent then refused to sign.

dividual members of a multiemployer group,[16] we have, according to the court, effectively given permission to unions to whipsaw those employers who do not sign such agreements.

The *Beck* court stated that allowing interim agreements strengthens a union's hand *vis-a-vis* the employers who continue to bargain within the unit. This it found tantamount to a rejection of the existence of the multiemployer unit since it is inconsistent to say that the union and some employers may act on an individual basis while other employers in the same unit, relegated to this position by the union's refusal to negotiate with them on an individual basis, must adhere to group bargaining. The court concludes that the Board's approval of individual interim agreements during multiemployer bargaining and without requiring withdrawal from the multiemployer unit is sufficient cause for according the remaining employers an equivalent right—unilateral withdrawal after impasse.[17]

The court rejected the Board's contention that since the union did not attempt to negotiate interim agreements the above rationale would not apply. It held that the employer's

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[16] *Plumbers and Steamfitters Union No. 323 (P.H.C. Mechanical Contractors),* 191 NLRB 592 (1971), and *Sangamo Construction Company,* 188 NLRB 159 (1971).

[17] The court employed a balancing test with respect to what it termed "economic weapons," taking its cue from *N.L.R.B.* v. *Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L. [Buffalo Linen Supply Co.],* 353 U.S. 87 (1957). There the Supreme Court held that nonstruck members of a multiemployer bargaining unit could utilize a general lockout as a defense to a selective strike. Since the Third Circuit asserts that in *P.H.C. Mechanical Contractors* and *Sangamo, supra,* the Board has sanctioned a "second" weapon for a union in addition to the selective strike, this resulting new imbalance requires the grant of a corresponding "second" weapon for each employer in a multiemployer unit.

right to withdraw unilaterally cannot be made contingent on the union's exercise of its concomitant right. The court held that, if they are equal rights, they should accrue simultaneously based upon the occurrence of an event which neither party can manipulate, i.e., impasse. Otherwise stated, the court, the party whose right accrues first would have a "tremendous bargaining advantage and leverage."

After acknowledging that its ruling would add to the instability of group bargaining, contrary to what the *Retail Associates* rules sought to accomplish, the court nevertheless found that the interest in preserving the balance of power in multiemployer bargaining outweighs the loss of stability. The court went on to suggest that if the Board were to "return" to the *Retail Associates* rules by disapproving of individual interim agreements the courts might well respond by disallowing unilateral withdrawal by employers after impasse.[18]

III

The foregoing summary reveals, in our view, a history of judicial reluctance to deal directly with the Board's approach to the impact of a bargaining impasse on multiemployer negotiations. Our concern has been with the dynamics of impasse, the potentialities for renewed unitwide bargaining, and thus with the stability of multiemployer units. The courts have focused on the Board's approval of individual interim agreements or substantial arguments having been entered into, and viewed the result as contrary to the principle of even-handed application of Board rules for withdrawal from multiemployer units. Further, the Board's "departure," in the words of the *Beck* court, from *Retail Associates* and its progeny has disturbed a balance of economic weapons between a union and the employer-members of a multiemployer unit. The courts have responded by creating an equitable im-

[18] *N.L.R.B.* v. *Beck Engraving Co.*, 522 F.2d at 484.

passe doctrine designed to redress the asserted imbalance by finding that impasse or impasse plus interim agreements or "substantial" agreements as in *Associated Shower Door* constitutes an unusual circumstance sufficient to justify unilateral withdrawal by an employer.

We respectfully disagree with the Third Circuit's characterization of a bargaining impasse as an occurrence which neither party can manipulate. We reaffirm our belief that "[i]n the overall ongoing process of collective bargaining, [impasse] is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position."[19] The Board is of the view, for the reasons set forth below, that we fulfill our statutory obligation to promote effective collective bargaining by permitting a union to negotiate, after impasse, true interim agreements with individual members of a multiemployer unit without thereby creating new withdrawal rights in the remaining employers.

Since all the courts have stressed the importance of postimpasse agreements between the union and individual employer-members of a multiemployer unit, it is vital to understand what kinds of agreements the Board has approved. In *Sangamo, supra,* the interim agreement continued the recently expired contract until a new associationwide contract was negotiated, at which time the employer was to adopt its terms and conditions and grant any wage increases retroactively. The Board, in dismissing charges that the employer and the union, respectively, violated Sections 8(a)(5) and 8(b)(3), held that the interim agreement had no significantly adverse impact on the integrity of the multiemployer unit. The agreement did not derogate the unit's bargaining authority nor did it place the early signer outside the coverage of the

[19] *Hi-Way Billboards, Inc.,* 206 NLRB at 23.

ultimate associationwide contract. In *P.H.C. Mechanical Contractors, supra,* the interim agreement contained the same terms that had been offered to and rejected by the association. As in *Sangamo,* the early signer was bound to become a party to the eventual unit contract. Thus, in both cases, since the early signers maintained a vested interest in the outcome of final union-association negotiations, the multiemployer unit was neither fragmented nor significantly weakened.

We distinguish, in the multiemployer bargaining context, between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining.

An example of the latter type of agreement is found in *Typographic Service Co.*[20] A panel majority, Chairman Fanning dissenting on the facts, there held that employer-members of a multiemployer bargaining unit did not violate Section 8(a)(5) by unilaterally withdrawing after impasse and the negotiation of separate contracts with several other employer-members.[21] The Board found that the union's conduct "effectively fragmented and destroyed the integrity of the bargaining unit" and thus fell within the "unusual cir-

[20] 238 NLRB No. 211 (1978).

[21] After a bargaining impasse, all employer-members placed into effect their last proposal. The following day the union struck 17 employers. The union then offered to end the strike against any employer who would reinstate the terms of the expired contract which provided for continuation of its terms until new terms were agreed upon. Seven employers accepted this offer. The union then offered one of these employers a choice between executing a contract based on an eventual associationwide contract or an agreement based on union contracts with employers, not members, of the unit. A second employer-member received a union offer to sign one of two contract proposals, both of which differed from the association's proposals. At this point the 10 employer-members who did not sign the interim agreements announced their withdrawal.

cumstances" exception of *Retail Associates*. The union offered to conclude its "interim" agreements with final agreements which differed not only from each other but also from proposals made during the preimpasse bargaining stage. Further, acceptance of the final offers made to individual employer-members would have rendered impossible a final agreement binding on all unit members.[22]

An interim agreement is thus appropriate to the extent it facilitates the breaking of impasse and the resumption of unitwide collective bargaining with all employers maintaining an equivalent stake in the final outcome. As in *Sangamo* and *P.H.C. Mechanical Contractors*, and unlike *Typographic Service Co.*, such an agreement is one which establishes terms and conditions of employment for one or more employer-members pending the outcome of renewed group bargaining. Any resulting group agreement would then apply to all employers, including each signer of an interim agreement. Acceptance of this commitment will preclude a finding that the early signers had withdrawn from the unit. We disagree with the courts who have viewed such temporary economic pressure on remaining group members as inconsistent with the concept of multiemployer bargaining units or with the Board's rules based on *Retail Associates* and its progeny.

With all due respect to the Third Circuit we disagree with its analysis of what factors are to be balanced in the multiemployer bargaining context and its conclusion as to how that balance is to be struck. Beginning with the Supreme Court's admonition that the Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use

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[22] Chairman Fanning notes that neither of these separate contracts was entered into. The "negotiation" his colleagues refer to could accurately be characterized as an exploratory tactic calculated to get the parties back to multiemployer bargaining, in effect an appropriate "dynamic" of impasse.

in seeking to gain acceptance of their bargaining demands,"[23] we reemphasize that, absent proof of unlawful motivation, parties have great leeway in exerting concurrent economic pressure on each other. As summarized in our *Hi-Way Billboards* decision, following a genuine impasse the union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees.[24] The *Beck* court, choosing to focus on only some of these options, granted withdrawal rights to employers in response to what it perceived as a two-to-one "weapons" imbalance in favor of the Union.[25]

However, the Board's statutory mandate is to balance, not economic weapons, but "conflicting legitimate interests."[26] We view the exercise of this responsibility as a complex un-

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[23] *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Insurance Co.]*, 361 U.S. 477, 497 (1960):

> [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.

[24] See *Hi-Way Billboards, Inc., supra* at 23.

[25] In examining the options available to employees, the *Beck* court, and the others noted herein, were unable to consider the Board's recent decision in *Olympia Automobile Dealers Association, supra,* where the Board recognized that, even in the absence of a finding of fragmentation, a multiemployer association has the right to object to the negotiation of a separate, final agreement between the union and an employer-member and can prevent the defection of one of its members by filing a refusal-to-bargain charge with the Board. This approach, rather than allowing the remaining employers to withdraw from the association and thereby destroy group bargaining, stabilizes group bargaining by allowing the association members to insist that parties remain in the unit in accordance with their original commitment. See also fn. 6, *supra.*

[26] *Buffalo Linen Supply Co., supra* at 96.

dertaking not readily, if at all, amenable to simple arithmetic calculations.

We have considered carefully the implications for multiemployer bargaining of interim agreements negotiated during impasse and conclude that such agreements may prevent significant unit fragmentation rather than cause it and do tend to facilitate the breaking of impasse. Interim agreements of the type deemed appropriate under our standards discussed *supra* are calculated to further, not destroy, unit integrity inasmuch as they preserve a continuing mutual interest by all employer-members in a final associationwide contract.[27] The provisions of the Act itself, rather than relative bargaining strengths, are the determinative factors in assessing the legality of particular forms of economic pressure.

In the instant case no interim agreements were made or even attempted. Considering the facts as described above in footnote 2, including the achievement of the multiemployer bargaining objective to continue the method of driver-pay on wage basis, and the supportive action that the lockout afforded the Respondent during the strike against it, we see no reason to allow the Respondent to withdraw from the multiemployer unit in untimely fashion. In the circumstances it is appropriate that the Respondent execute the contract ultimately achieved by the other unit members. Accordingly, we hereby affirm the original panel decision finding that the Respondent violated Section 8(a)(5) of the Act.

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[27] This is our response to contentions that a union's negotiation of an interim agreement is either "tantamount" to rejection of the existence of a multiemployer unit, or a consent to withdrawal.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms as its Order the Order heretofore entered in this proceeding on May 12, 1977 (229 NLRB 629).

Dated, Washington, D.C. August 6, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Pennello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix C.

JD-833-76
Medford, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

CHARLES D. BONANNO LINEN SERVICE, INC.

and Case No. 1-CA-11,628

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Francis X. McDonough, Esq.,
Boston, MA, for the
General Counsel.
Sidney A. Coven, Esq.
(*Lepie & Coven*), Boston,
MA, for the Respondent.
Alan J. McDonald, Esq.
(*Grady & McDonald*), Boston,
MA, of the Charging Party.

DECISION

Statement of the Case

JAMES M. FITZPATRICK, Administrative Law Judge: The main question in this case is whether one employer, of a

group negotiating with a union, may, by leaving the group during a bargaining impasse, avoid obligations under the contract later agreed on between the Union and the remainder of the group. As set out hereinafter I find the withdrawing employer is bound by the contract because circumstances were not so unusual as to justify withdrawal where the Union has not consented.

The case arises from unfair labor practice charges filed April 9, 1976 by Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union). A complaint based on the charges issued May 20, 1976 alleging that Charles D. Bonanno Linen Service, Inc. (Bonanno) engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to execute a collective bargainng agreement negotiated between the Union and a group of employers after Bonanno purported to withdraw from the group. Bonanno answered, admitting jurisdictional allegations, the authority of the group to bargain on behalf of member employers, including Bonanno, and the attempt of Bonanno to revoke that authority. Bonanno denied the balance of the allegations, including legal conclusions that it engaged in unfair labor practices. The case was tried before me at Boston, Massachusetts on August 30, 1976.

Based on the entire record, including my observation of the witnesses, and consideration of excellent briefs from the parties, I make the following:

Findings of Fact

I. The Employers Involved

Bonanno is a Massachusetts corporation engaged at Medford, Massachusetts in the laundering, rental and distribution of linen, uniforms, and related products. In the operation of

its business it annually receives at its Medford plant from points outside Massachusetts chemicals, linens and other fabrics valued over $50,000. Its annual gross receipts exceed $500,000. The complaint alleges, the answer admits, and I find, that Bonanno is an employer engaged in commerce within the meaning of the Act.

The New England Linen Supply Association (the Group) is comprised of 10 employers, including Bonanno, engaged in the linen service business.[1]

II. The Labor Relations

A. *Background*

The Union is a labor organization within the meaning of Section 2(5) of the Act. It represents the truckdrivers and helpers employed by Group members. The parties stipulate that the employees so represented constitute an appropriate bargaining unit.

For some years past the 10 employers referred to above have negotiated as a group with the Union respecting the terms of employment of their drivers and helpers. On September 21, 1972 they signed individual and identical agreements with the Union which were to remain in effect until April 18, 1975 and thereafter until amended by mutual agreement or terminated in accordance with a provision that "either party desiring to amend or terminate the contract shall on or after February 15, 1975 notify the other party in writing of said intention."

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[1] The other nine are Bristol Coat & Apron Service Co., Loyal Crown Linen Service, Inc., Delaney Linen Service, Inc., Federal National Linen Service Co., Independent Leasing Corporation, Gilman Towel Supply Co., Inc., Morgan Services, Inc., Norfolk County Linen Service and Standard Linen Service.

B. *Negotiations for a Current Contract*

On about February 19, 1975 Bonanno authorized the Group to bargain collectively on its behalf with the Union, and subsequently, such bargaining took place. On March 14, 1975, apparently in anticipation of possible termination of the existing agreements but without formal notification thereof, the Union and the Group met for their first negotiating session looking toward a new agreement. Thereafter they held further negotiating meetings on March 19 and 26, April 1, 3, 11, 13, 14, 16, 17 and 30. In the meantime, on April 18 the Union by letter notified each member of the Group that it was giving 60-day notice of termination pursuant to the terms of the 1972 agreements. On April 23, 1975 the attorney representing the Group by letter offered to meet with the Union for the purpose of negotiating a new agreement.

On April 30, 1975 the negotiators reached agreement, subject to ratification by the employees, which provided for compensation to employees on an hourly basis. On May 4, 1975 the employees voted to reject the contract.

The negotiators next met on May 12 at which time the Union proposed that employees be compensated on a commission basis rather than at an hourly rate. Group negotiators rejected this proposal, adhering to the position previously taken. The negotiators again met on May 15 and the Union again insisted on pay on a commission basis. Management negotiators again rejected the proposal, advising the Union that they would accept a strike rather than concede on the issue. At a further session on May 20 the positions of the parties remained unchanged. It is undisputed that an impasse on this issue had been reached on May 15. A further meeting on June 18 was unsuccessful in breaking the impasse.

C. *The Strike and Lockout*

On June 23, 1975, the impasse continuing, the Union called a selective strike against Bonanno in which all of its drivers participated. At the time of the hearing that strike was still in effect. The fact that the Union struck only Bonanno is not a circumstance which justified Bonanno's later withdrawal from the Group. Selective strikes are a legitimate tactic for exerting economic pressure. Their occurrence does not relieve a struck employer of his obligation to bargain with the Union. See *Beck Engraving Co.*, 213 NLRB 53, 54-55 (1974), enf. den. 522 F. 2d 475 (C.A. 3, 1975); *State Electric Service, Inc.*, 198 NLRB 592, 593 (1972); *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), supplementing 191 NLRB 244, enf. den. 500 F. 2d 181 (C.A. 5, 1974).

After the strike began, most of the other employers in the Group locked out their drivers, thus presenting a united front to the Union. The parties continued to meet, however, in an effort to reach an agreement. Negotiating sessions were held on July 22, August 15 and September 2, 1975. But impasse continued on the issue of method of payment to drivers.

The Union argues that because some employers during strategy sessions urged that a sky-high wage offer be made in an effort to break the impasse, a tactic which Bonanno opposed, a potential break in the impasse was apparent and therefore continuation of the impasse should not be viewed as a legitimate reason for Bonanno withdrawing from group bargaining. There is no merit to this contention. Remarks made during strategy sessions could have only the most speculative impact on the actual bargaining situation.

Of greater significance is the fact that before Bonanno withdrew two other employers in the Group secretly had been in direct touch with the Union, presumably in an effort to make a separate settlement.[2] Nothing came of these secret

[2] Nothing in the record suggests that it was the Union that made the secret overtures. In any case, the Union did not make any agreement with the wayward employers.

contacts. Whether they reached the level of negotiations does not appear. In the circumstances I find the Group was not thereby fractured in a manner warranting withdrawal by others in the Group. See *Ice Cream, etc., Workers Union Local 717 (Ice Cream Council),* 145 NLRB 865, 870 (1964).

D. *The Respondent's Withdrawal from the Group*

On November 21, 1975, the strike and lockout still being in effect and the impasse continuing, Bonanno revoked its prior authorization to the Group to bargain on its behalf, stating, "The Company is withdrawing from the Association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." Bonanno indicated it would engage in bargaining directly with the Union. A copy of its revocation letter was mailed to the Union on November 21 and that same day read to a union representative over the telephone.

Between commencement of the strike on June 23 and the notice of withdrawal on November 21 Bonanno hired permanent replacements for all of its striking drivers. Thus, from its point of view there was less reason than earlier to continue with group bargaining. But the difference in personnel was not such a circumstance as would justify withdrawal from the Group because the hiring of replacements was a logical outgrowth of the strike and a normal management effort to survive. *N.L.R.B.* v. *MacKay Radio & Tel. Co.,* 304 U.S. 333 (1938). Use of such normal measures are not "unusual circumstances" which justify withdrawal from group bargaining.

Bonanno strongly urges that the ongoing impasse was an unusual circumstance justifying its withdrawal from the Group in accordance with the Board's decision in *Retail Associates, Inc.,* 120 NLRB 388, 393-395. It especially relies

on four Court of Appeal decisions so holding. See *N.L.R.B.* v. *Beck Engraving, Co.*, 522 F. 2d 475 (C.A. 3, 1975); *N.L.R.B.* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (C.A. 9, 1975); *N.L.R.B.* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (C.A. 5, 1974); and *Fairmont Foods Co.* v. N.L.R.B., 471 F. 2d 1170 (C.A. 8, 1972). See also the dictum of the First Circuit in *N.L.R.B.* v. *Field and Sons, Inc.*, 462 F. 2d 748 (1972).

The General Counsel and the Union point out that the Board has not followed the line taken by the Courts of Appeal. Under Board law a bargaining impasse does not constitute such an unusual circumstance as to justify an employer's unilateral withdrawal from group bargaining. See *Hi-Way Billboards, Inc.*, 206 NLRB 22 on remand from *N.L.R.B.* v. *Hi-Way Billboards, Inc., supra;* and *Goodsell & Vocke, Inc.*, 223 NLRB No. 12 (slip op. p. 13). The position taken by the Board is, of course binding on me. *Insurance Agents' International Union,* 119 NLRB 768, 773. Accordingly, I find the circumstance of an ongoing impasse to be an insufficient reason for Bonanno to have withdrawn from the Group. Accordingly, unless the Union went along with the withdrawal (a subject discussed later herein) Bonanno had a continuing duty to participate in group bargaining, a duty which it violated by withdrawing.

E. *The Continuing Negotiations*

Shortly after the withdrawal a Group representative informed the Union by letter dated November 24, 1975 that he understood the Union had been notified that Bonanno had withdrawn. The letter stated that the remainder of the Group would continue to negotiate with the Union and announced that the lockout by the remaining members was being terminated.

Thereafter the Group without Bonanno met with the Union and negotiated further on December 1, 1975, February 4, April 5 and April 13, 1976.[3]

On April 13, 1976 the Union dropped its demand for compensation by commission and accepted a management offer of a revised hourly wage rate. With this development, agreement was finally reached on a new contract.

F. *The Union's Claim on Bonanno*

Although the Union had not communicated with Bonanno since its withdrawal, other than to file unfair labor practice charges on April 9, after it reached agreement with the Group on April 13, it claimed that Bonanno also was bound by the terms of the contract bargained. By letter of April 29, 1976, the Union informed Bonanno that the Union at no time had consented to its withdrawal, that it considered Bonanno to be a member of the Group and bound by the settlement reached. On May 3, 1976 Bonanno's attorney replied to the Union by letter denying it was bound by the agreement reached.

G. *Union, Consent, Acquiescence and Estoppel*

Bonanno contends that even if its withdrawal was untimely and unjustified by unusual circumstances, the Union has gone along with the withdrawal by consenting or acquiescing to it, and in any case should not now be heard to object to it.

1. Consent or acquiescence

As to consent, it is clear the Union did not specifically consent at the time of withdrawal. When Charles Bonanno read the withdrawal letter to union field representative Herbert

[3] On April 9 the Union filed the instant unfair labor practice charges against Bonanno.

Salter over the telephone on November 21, 1975, Salter made no comment other than to indicate he would wait to see a copy of the letter before confirming the telephone call and he would probably consult the Union's attorney. This could not reasonably be understood as consent to what Bonanno was doing but only as acknowledgement of notice that he was doing it.

Up to that point Charles Bonanno had been a member of the employer bargaining committee. At the first negotiating meeting following withdrawal Union President William McCarthy inquired as to who had replaced Charles Bonanno on the employer bargaining committee. He thus recognized that Bonanno was in fact not actively participating in the continuing negotiations. But it was not more than that. It did not amount to an agreement with Bonanno's legal position that it could withdraw anymore than continuing negotiations with the balance of the Group amounted to consent to Bonanno's absence. To hold otherwise would give every dissident in group bargaining the power to ruin collective bargaining for all others involved. By negotiating with the balance of the Group and recognizing that Charles Bonanno was no longer on the bargaining committee, the Union only acknowledged the *de facto* situation.

No futher reference to Bonanno's absence occurred until the final session on April 13. At that meeting, after agreement was reached on contract terms, an attorney for the Group asked, "What about pending litigation?" He was referring to collateral litigation including an antitrust suit by the Union against the Group, an injunction suit by the Group against the Union, and unemployment compensation cases. He apparently did not intend to include the instant unfair labor practice charges which Bonanno had filed April 9 because the Group attorneys were unaware of them. Herbert Salter, speaking for the Union, responded that, "... we

would probably wash all the pending litigation—this does not include Bonanno, they are separate now and not in the group." At that time Bonanno was not represented in the pending litigation by the attorneys for the Group, but was separately represented by the attorneys who later appeared for it in the Board proceeding.

Salter's response acknowledged the long established *de facto* separation of Bonanno from the Group. But he could not have meant to release Bonanno from its duty to bargain with the group. Section 8(a)(1), and (5) unfair labor practice charges based on Bonanno's refusal to bargain with the Group had been filed only 4 days earlier and are still pending in this proceeding. They stand as a constant union assertion that Bonanno is bound to Group bargaining. Respecting the other pending litigation, Salter's response is ambiguous when applied to Bonanno.[4] Such ambiguity should be construed in a manner consistent with the Union's position in the pending unfair labor practice charges. On April 29 the Union sent Bonanno a letter denying it had ever consented to its withdrawal and asserting it was bound to the negotiated contract.

Considering the above circumstances I find that the Union did not, directly or by implication, consent to, nor acquiesce in, Bonanno's withdrawal from Group bargaining. See *Fairmont Foods Company,* 196 NLRB 849; *John J. Corbett Press, Inc.,* 163 NLRB 154, 158 fn. 14; *The Carvel Company, et al.,* 226 NLRB No. 18, fn. 8 (slip op., p. 6), 93 LRRM 1157, 1160.

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[4] It is not clear how the Union could wash out its antitrust suit against all except Bonanno, nor why it would want to leave Bonanno as the only surviving plaintiff in an injunction suit against the Union.

2. Estoppel

Bonanno also contends that the Union (and the General Counsel) should not now be heard to object to the withdrawal because (a) for months following the withdrawal the Union remained silent and did not affirmatively object (b) the Union continued bargaining with the balance of the Group, and (c) following the withdrawal the Union accepted the beneficial consequences of the withdrawal, namely, termination of the lockout by other employers in the Group. The Board has already rejected these contentions in *Fairmont Foods Company, supra.*

In sum, I find that Bonanno was obliged to bargain with the Group, that its attempt to withdraw while negotiations were in progress was not timely nor justified by the circumstances, including the ongoing impasse and the selective strike, and since the withdrawal the Union has neither consented to nor acquiesced in the withdrawal nor should it be estopped now from claiming that Bonanno is bound to the agreement reached with the Group. Bonanno's refusal to honor that agreement is, and has been, a breach of its duty to bargain in good faith and is an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Bonanno set forth in section II, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Bonanno is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and has been at all material times, the exclusive bargaining representative of the employees of Bonanno in the following appropriate unit:

> All linen supply truck drivers and helpers employed by members of the New England Linen Supply Association, exclusive of all other employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

4. By its refusal to adopt the agreement reached between the Union and the Group bargaining on behalf of members of the New England Linen Supply Association, and by its refusal to give effect to the terms and conditions contained therein, Bonanno engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Bonanno has engaged in certain unfair labor practices, I recommend it cease and desist therefrom and take certain affirmative action that I find necessary to effectuate the policies of the Act. In this connection Bonanno should immediately sign and implement the agreement reached between the Union and the Group, and, as urged by the General Counsel in his brief, apply it retroactively to April 13, 1976, making its employees whole for any loss of

earnings suffered since then as a result of its failure to apply the agreement. See the *Carvel Company, et al.*, 226 NLRB No. 18. Backpay is to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at 6 percent calculated according to the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Nothing herein is to be construed as requiring Bonanno to recoup wages or benefits already received by its employees. Bonanno should also preserve and make available to Board agents, upon request, all pertinent records and data necessary in analyzing and determining whatever backpay may be due. It should also post appropriate notices at its Medford, Massachusetts facilities.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

ORDER

Respondent Bonanno, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters Local Union No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the appropriate unit described herein.

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[5] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Refusing to sign and to implement the 1976-79 linen supply agreement reached between the above Union and the Group representing employer members of the New England Linen Supply Association with respect to its employees in the appropriate unit described herein.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the National Labor Relations Act, as amended.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Forthwith sign and implement the above-described agreement and give retroactive effect thereto from April 13, 1976.

(b) Make whole its employees in the above-described bargaining unit for any loss of pay or other employment benefits they may have suffered by reason of its refusal to sign and implement the aforesaid agreement, in the manner set forth in the section entitled "The Remedy".

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Medford, Massachusetts, copies of the attached notice marked "Appendix".[6] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by

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[6] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent Bonanno's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date hereof, what steps it has taken to comply herewith.

Dated, Washington, D. C., Dec. 20, 1976.

/s/ James M. Fitzpatrick
Administrative Law Judge

APPENDIX

FORM NLRB-4727 (9-69) JD-833-76

[SEAL] **NOTICE TO EMPLOYEES** [SEAL]

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain with TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, by refusing to sign and implement the 1976-79 contract between the Union and member employers of the New England Linen Supply Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act, as amended.

WE WILL forthwith sign and implement the above-mentioned contract and give retroactive effect thereto, from April 13, 1976.

WE WILL make whole our employees in the bargaining unit for any loss of pay or other employment benefits they may

have suffered by reason of our refusal to sign and to implement the aforesaid collective bargaining agreement.

CHARLES D. BONANNO LINEN SERVICE, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 12th Floor - Keystone Building, 99 High Street, Boston, Mass. 02110. Telephone (617) 223-3348.

229 NLRB No. 108

FJM
D–2197
Medford, Mass.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARLES D. BONANNO LINEN SERVICE, INC.

and Case 1–CA–11628

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 20, 1976, Administrative Law Judge James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief and also a brief in opposition to the Respondent's exceptions, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Charles D. Bonanno Linen Service, Inc., Medford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C. May 12, 1977

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)